No. 43975-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

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PAULA JONES, Appellant,

v.

GRAYS HARBOR COUNTY, a Municipal Corporation, organized and existing under the laws of the State of Washington; ALBERT CARTER; BOB BEERBOWER; MIKE WILSON; ROD EASTON; MARILYN LEWIS; MARSHA WHITAKER; CLAUDIA SELF; and TERESA OLSON, Respondents.

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# BRIEF OF RESPONDENTS

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## I. INTRODUCTION

Paula Jones, a former employee of Grays Harbor County Fairgrounds, appeals the trial court's order granting Respondents' motion for summary judgment dismissing Jones's claims arising out of her termination.[1] In her notice of appeal, Jones states that she is appealing only the summary judgment dismissal of her retaliation claim. However, in her brief, Jones conflates the elements of a retaliation claim and a claim for disparate treatment discriminatory discharge. Accordingly, Respondents will address both of these claims in this brief.[2] This Court

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[1] Jones sued not only Grays Harbor County ("Grays Harbor"), but also a number of individuals: three Grays Harbor County Commissioners (Al Carter, Bob Beerbower, and Mike Wilson), an employee of the Grays Harbor County Fairgrounds (Rod Easton), an employee of Grays Harbor County (Marilyn Lewis), and members of the Grays Harbor County Fairgrounds Board of Directors (Marsha Whitaker, Claudia Self, Teresa Olson). CP 3-11.

In her deposition, Jones explained that she sued Carter to find out what the female members of the Fairgrounds Board said to persuade him to discharge her and also because "I just think that it would be nice for – in my little fantasy world I assumed someday he would tell me he was sorry." CP 82. Jones stated that she sued Wilson simply because he was a County Commissioner, not because of any action or inaction on his part. CP 83. Jones sued Marilyn Lewis because "Marilyn was just a personnel person, and I thought it might be good to have her [named in the lawsuit] because she could be questioned on when I was called down to the office." CP 84. Jones's basis for suing Easton was not because of any alleged unlawful conduct on his part, but rather because Jones felt Easton was "the instigator of a lot of this." CP 83. The trial court's order granting Grays Harbor's motion for summary judgment dismissed Jones's claims against all the defendants. In this brief, the respondents will be collectively referred to as "Grays Harbor" or "Respondents," unless the context requires otherwise.

[2] Jones makes no argument in her brief as to the summary judgment dismissal of any other claims she asserted. Accordingly, Respondents do not address those claims.

should affirm the trial court's order granting summary judgment because Jones cannot show the existence of a genuine issue of material fact as to her claims and Respondents are entitled to judgment as a matter of law. Further, Jones's procedural arguments are without merit and do not compel reversal of the order granting summary judgment. The trial court's order should be affirmed.

## II. STATEMENT OF THE CASE

### A. Paula Jones's Employment History with Grays Harbor County Fairgrounds

Jones began working for the Grays Harbor County Fairgrounds in 1987 as an Office Assistant to her close friend, Debbie Adolphsen. CP 39-41. Jones remained in that position until 1997, when she applied to become the Fairgrounds Office Manager. CP 91. In December 2000, Jones became Deputy Director/Assistant Fair Manager, despite the fact that she did not possess all of the minimum qualifications for the position as set forth in the job description. CP 92-95. In 2003, Jones's friend Adolphsen became Fair Manager. CP 42.

There is no evidence in the record to suggest that Jones was, at any time, anything other than an at-will employee of Grays Harbor County.

Nor does Jones dispute that she was at all times an at-will employee and accordingly could be terminated for any lawful reason or for no reason.[3]

## B. In Summer 2007, Jones is Involved in a Dispute with Grays Harbor County Fairgrounds Board Member David Persell

Jones's argument on appeal involves an incident that occurred in the summer of 2007 between Jones and David Persell, a member of the Grays Harbor County Fairgrounds Board of Directors. The incident arose after Jones accused Persell of receiving personal deliveries at the Fairgrounds. Jones testified:

> A: Debbie [Adolphsen] was on vacation, and I was the interim manager, and it was on a Monday. I think Rod [Easton] was there. There was no maintenance men on the grounds and something was to be delivered. And Juanita [Adolphsen], who was the office person, took a call about the UPS wanting to deliver something, and they needed a forklift to be there to unload it.
>
> And Dave [Persell] had been doing volunteer work out on the grounds, I mean he had been doing some gardening for us and worked really hard.
>
> Juanita says, Paula, what should I do? None of us can operate a forklift. I mean, we have no guys.
>
> I said give him Dave Persell's phone number, because I knew he wasn't very far away and he operated the forklift.
>
> And so we gave the UPS guy – Juanita did – the number. So we thought we had solved it, you know, everything was great.
>
> I don't know how much later in the day Dave Persell came in. I was sitting at the back table with Rod, wasn't out in the front office. And Dave started – came in

[3] *See, e.g., Roe v. Teletech Customer Care Mgmt. LLC*, 171 Wn.2d 736, 754-55, 257 P.3d 586 (2011).

> very mad. He had a – he was mad about us not getting somebody to unload that. I guess they hadn't connected maybe. I don't know, because he was so angry, and he was kind of getting on Juanita's case.

CP 62-63.

Jones claims that Adolphsen told her that the delivery in question was a workbench for Persell's son. CP 64. Persell, however, told Jones that the delivery was not in fact a personal delivery, but rather was a delivery of equipment for the fair. CP 65. Jones dismissed Persell's concerns that she be clear about the true contents of the delivery and told him that all that mattered was that a forklift was not available. CP 65.

The incident Jones now claims was an "assault" occurred after Persell attempted to explain that the delivery was equipment for the fair and not a personal delivery. Jones testified:

> The next step after that, we get through the fair. That was the 2008 fair – no, the 2007 fair, excuse me. That was the 2007 fair, I think.
>
> I thought it all – I never gave that another thought. I liked Dave, and I thought it blew over. We talked at [the] fair. We had meetings together. Everything to me was just fine. So I don't know the exact date, but it was after [the] fair, maybe September, October, the incident that I believe started everything is he came in – I was sitting out in the front office – in the middle part of it, not the front, and I just answered the phone, didn't have my glasses.
>
> Dave came in, and he kind of walked over to me, and he shoved a piece of paper in my face, like shoved this piece of paper in my face. And I go, What, Dave, is this an invoice? I'm just assuming it's an invoice, that we need to pay for something he had done.

> And he goes, No, this is my – he kept saying that I had called him a liar – this was – he wanted me to look at the invoice. I said, Dave, I don't have my glasses.
>
> And he kept shoving it in front of my face, and he's standing over me, and he was yelling at me. Like I said, there was spittle coming out of his mouth. He was enraged. His eyes were bulging. He was red in the face.

CP 67.

This exchange between Jones and Persell occurred on a Friday. The following Monday, Jones delivered a letter to her supervisor, Adolphsen, stating that she did "not feel safe around Dave Persell" and that she would no longer "be in the same room, work with, or engage in any conversation with Dave Persell."[4] CP 97-98.

A police report regarding this incident was filed in August or September 2007.[5] CP 50. Jones's friend Adolphsen decided "to try to force Dave Persell to resign from the Board." CP 69; *see also* CP 71, 72 ("Debbie was on a mission to get him to resign".). Neither the chair nor

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[4] To clarify, the letter is dated August 20, 2007 and states that the date of the incident was August 17, 2007. Thus, Jones's deposition testimony, as set forth above, inaccurately described the incident as occurring in September or October of 2007. Regardless, however, the precise date of the incident has no bearing on the issues presented in this appeal.

[5] In her deposition, Jones testified that she did not file a police report and, in fact, "did not know it had went as far as to the police. I honestly did not know that." CP 37. Jones guessed that Adolphsen had reported the incident to the police. Nonetheless, in her declaration in support of her (untimely) response to Grays Harbor's motion for summary judgment, Jones stated: "I filed a police report concerning this incident, as did Debbie Adolphsen, who witnessed the event." CP 185. Regardless, however, whether only Adolphsen or both Adolphsen and Jones filed a police report is immaterial as to whether the trial court properly dismissed Jones's claims on summary judgment.

the vice-chair of the Board, however, wanted Persell to resign and felt that Jones was "being whiny and just making too much of it." CP 70-72. Persell resigned from the Board on October 11, 2007. CP 100.

### C. Debbie Adolphsen Announces Her Retirement as Fair Director

Before the 2008 fair, in February or March of 2008, Adolphsen contemplated retiring as Fair Director. CP 44, 46. Rather than fully retire, Adolphsen decided that the fair would be managed by a team of three – herself, Jones, and Easton. CP 47. The Board of Directors was not as enthused about Adolphsen's management team idea as Adolphsen had hoped, but the Board did not immediately reject her plan. CP 47.

### D. Jones's Performance as Interim Fair Director is Poor and Unprofessional

The County Commissioners were not pleased with Jones's performance when she became Interim Fair Director. CP 79. Jones had difficulty dealing with fair vendors, beginning with her first year as vendor manager. CP 60-61. In addition, during the 2008 Fair, Jones's performance was less than satisfactory when she overruled a majority vote of the Fair Board regarding the best food vendor at the fair. Three members of the Board voted for a Hawaiian food vendor as best food vendor; Jones cast the sole vote for a bratwurst vendor. Despite the fact that the Hawaiian food vendor received the majority vote, Jones

unilaterally decided to declare the bratwurst vendor the best food vendor at the fair. The Board members expressed their unhappiness at Jones's decision to ignore the majority vote and to declare the second place finisher as the winner. CP 57-59.

As another example of Jones's poor and unprofessional performance as Interim Director, she opened and read a private email on Rod Easton's computer in Easton's office concerning a dinner invitation from one of the Fair Board members, an incident Jones does not deny. Jones testified that, in October 2008, she walked into Easton's office to answer the phone, saw that Easton's email was displayed, saw the email about dinner, opened it, read it, forwarded it to her email, and printed it. CP 74. In her view, Easton's private email was proof of a secret meeting (*i.e.*, dinner) between Easton and the Fair Board. CP 74, 75.

**E. The Fair Board Accepts Applications for Adolphsen's Replacement as Fair Director**

After the 2008 fair, the Fair Board decided to hire a Fair Director, rather than continue to utilize Adolphsen's three-member management team model. The Board invited Jones, Adolphsen, and Easton (the three members of the management team) to apply for the position of Fair Director. CP 52. Even though Jones did not want to be Fair Director, she nevertheless applied for the position so the County Commissioners and the

Fair Board would "see what [she] accomplished over the years, and "to throw them a curve to – I wanted them to see who I was." CP 53-54. Easton also applied for the Fair Director position. CP 54.

Neither Jones nor Easton was selected to serve as Fair Director. The Board hired a person who worked for the Montesano Parks and Recreation Department to be Fair Director. CP 80.

## F. The Board Eliminates Jones's Position of Assistant Director Based on Both Budgetary Concerns and Jones's Poor Performance as Interim Director

By letter dated December 1, 2008, the County Commissioners informed Jones that they were considering terminating her employment with the County. CP 27-28. The Commissioners' reasons were twofold: budgetary concerns and Jones's unsatisfactory performance as Interim Fair Director. The letter stated in part:

> The Commissioners have determined that you will not be considered for the permanent Director position. The Commissioners are considering eliminating the Assistant Director position, the position you held prior to becoming the Interim Director, as one way to reduce staff costs. We are considering this for two reasons—one because cuts need to be made and the duties of the Assistant Director can be more easily distributed among the other staff members; and two, because your performance over the last several months has made you less effective among fair staff and board members. We want to be clear that this is not just a question of needing to make cuts in the fair's budget and searching for [the] best place to make the cuts, but also of your performance.

CP 28.

As examples of Jones's unsatisfactory performance as Interim Director, the Commissioners cited Jones's reading Easton's private email regarding dinner among Easton and two Board members which, in the Commissioners' words, had "nothing to do with county business." CP 27. The Commissioners also noted that Jones showed the email to Debbie Adolphsen, who then confronted Easton "in an unproductive and accusatory way." CP 27. The Commissioners also cited reports from Board members as to Jones's inability to work with staff as a team and to respond to questions from staff aside from referring them to Adolphsen, and the Commissioners further cited her unprofessionalism towards vendors, staff, and the public. The Commissioners noted that Board members reported that when Jones's performance was questioned, "you [Jones] report that you feel attacked indicating that you either cannot answer the question and deflect or cannot manage differing opinions or conflict very well." CP 27. In sum, the Commissioners concluded that Jones was not able to (1) effectively communicate with the Fair Board, (2) manage staff in a constructive way, (3) effectively manage conflict, or (4) perform her duties in a professional manner. CP 27.

The Commissioners afforded Jones the opportunity to meet with them to respond to the pre-termination letter. CP 28. After that meeting,

however, the Commissioners nonetheless decided to terminate Jones's employment with the county. CP 30. Jones was placed on administrative leave, with an effective termination date of December 31, 2008. CP 32.

## G. Procedural Background

Jones filed a statutory tort claim with the County on November 29, 2010. CP 110-11. The following day, she filed a document styled as a complaint. CP 113-21. On January 31, 2011, Jones filed an actual complaint asserting causes of action for defamation, retaliation, sex discrimination,[6] and wrongful termination in violation of public policy. CP 3-11.

Respondents filed and timely served a motion for summary judgment and supporting declarations on July 3, 2012. CP 22-148, 867-92. The motion was scheduled to be heard on August 3, 2012. CP 893-94. Pursuant to CR 56(c), Jones's response or memorandum in opposition to Respondents' motion for summary judgment was due no later than July 23, 2112, eleven calendar days before the hearing on the motion for summary judgment. That due date came and went with no response forthcoming from Jones. As of July 30, 2012—the date Respondents' reply would have been due had Jones timely filed a response—Jones had

[6] Although captioned as claims for "Race Discrimination," the two causes of action alleged in Jones's complaint are clearly claims for gender discrimination.

not filed a response of any kind. Accordingly, on that date, Respondents filed a reply in support of their unopposed motion for summary judgment. CP 895-99. Counsel for Respondents eventually received a response and accompanying declarations from Jones during the late morning of August 2, 2012, less than 24 hours before the scheduled hearing on Respondents' motion for summary judgment. CP 919-51.

Respondents moved to strike Jones's untimely response to their motion for summary judgment. CP 952-58. By order dated August 3, 2012, the trial court denied the motion to strike but imposed sanctions against Jones and continued the hearing to August 14, 2012.[7]

Respondents filed a reply to Jones's response to their motion for summary judgment. CP 1008-23. Jones filed a motion to strike the reply as untimely.[8] At the hearing on Respondents' motion for summary judgment—which was continued because of Jones's failure to timely file a response to the motion—Jones asked for yet another continuance. CP 574. Jones's counsel initially informed the court that he would need three to four more hours to prepare arguments addressing those raised in Respondents' reply, but he later abandoned his request for additional time

[7] Jones has still not paid the sanctions.
[8] The motion to strike was not entered on the docket.

and informed the court that he wanted to move forward then and there. CP 575.

The trial court granted Respondents' motion for summary judgment in part. CP 680-681. Specifically, the court granted summary judgment as to all of Jones's claims except for the disparate treatment discriminatory discharge claim.

Respondents moved for reconsideration of the portion of the trial court's order denying summary judgment as to Jones's disparate treatment discriminatory discharge claim, and Jones filed an opposition to the motion for reconsideration. CP 695-708, 739-57. After hearing oral argument from both parties, the trial court granted Respondents' motion for reconsideration. CP 846-50. As a result, all of the claims Jones's raised in her complaint were dismissed. Jones appeals. CP 852-57.

## III. ARGUMENT

### A. Respondents Are Entitled to Summary Judgment Dismissal of Jones's Claims Because There Is No Genuine Issue of Material Fact as to Any Claim and Respondents Are Entitled to Judgment as a Matter of Law

#### 1. Standard of Review

This Court reviews summary judgments de novo and engages in the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Summary judgment is appropriate if the pleadings,

depositions, and affidavits show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*.

2. Retaliation

In her complaint, Jones cites RCW 49.60.210 as the basis for her retaliation claim. RCW 49.60.210 makes it an unfair practice for any employer to discharge or otherwise discriminate against any person in retaliation for the employee's opposing practices forbidden by the Washington Law Against Discrimination (WLAD) or because the employee filed a charge, testified, or assisted in any proceeding under the WLAD. To avoid summary judgment dismissal of a retaliation claim,

> the employee must first show a prima facie case of retaliation: (1) The employee engaged in a statutorily protected activity, (2) the employer took adverse employment action against her, and (3) there is a causal link between the protected activity and the adverse action. Once a prima facie case is established, the burden then shifts to the employer to show a legitimate purpose for the adverse employment action. If the employer shows a legitimate purpose, the burden shifts back to the employee to show that this legitimate reason was pretextual.

*Crownover v. State ex rel. Dep't of Transp.*, 165 Wn.2d 131, 148, 265 P.3d 971 (2011) (internal citations omitted).

Jones has failed to make the required showing to avoid summary judgment dismissal of her retaliation claim. First, she has failed to show

that she was engaged in an activity protected by the WLAD or that she opposed practices forbidden by the WLAD.[9] The activities which form the basis of Jones's retaliation claim are her "standing up to" Persell when he yelled at her because of her misstatements regarding the contents of the UPS delivery, reporting his yelling, and demanding his resignation from the fair board. She does not, and indeed cannot, demonstrate that these activities are among those protected by the WLAD.

Jones vaguely asserts that Persell's actions towards here were based on her gender. But, in her letter to Adolphsen in which she complained about Persell's conduct towards her and stated that she would no longer work with Persell, Jones clearly states that Persell was upset with Jones because she was "going around calling him a liar" about the contents of the UPS delivery. CP 98. This has nothing to do with Jones's gender. Nowhere in any of Jones's descriptions of the incident with Persell, or anywhere in the record for that matter, is there any evidence to support even the inference that the incident was in any way related to Jones's gender or to sex discrimination.[10]

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[9] As this court is well aware, the WLAD prohibits, inter alia, discrimination in employment based on age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or disability. RCW 49.60.180.

[10] Jones's allegation that Persell had sexually assaulted a fair board member in Las Vegas several years earlier is a gross distortion of the record. The board member, Marsha Whitaker, testified that she was going up an escalator in

Jones has completely failed to establish that she was engaged in a statutorily protected activity. For this reason alone, summary judgment dismissal of her retaliation claim is appropriate. Further, however, even if her activities could somehow be characterized as statutorily protected, summary judgment is nevertheless still appropriate because she failed to establish a link between the "protected activity" and her termination from employment. The incident with Persell occurred in August or September 2007; Jones reported the incident in either August or September 2007;[11] she was terminated in December 2008. Thus, at least 15 months elapsed between the events.[12] In *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 991 P.2d 1182 (2000), 15 months elapsed between the employee's claimed protected activity and the employer's adverse employment action. Noting that "[o]ne factor supporting retaliatory motivation is proximity in time between the protected activity and the

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front of Persell and Easton and "something" touched her bottom. She had no idea who or what touched her, but thought "well, it has to be one of those two. And so I picked, must have been David [Persell]." CP 496. Even if this testimony can somehow be construed as making Whitaker the victim of a sexual assault by Persell, it has no relevance whatsoever to whether Jones was engaged in a statutorily protected activity.

[11] As discussed previously, given Jones's testimony that a police report was filed in August or September, the incident could not, as she speculated in her deposition, have occurred in October. Again, however, Jones's confusion about the date of the occurrence that lies at the center of her lawsuit does not change the fact that the summary judgment dismissal of her claims was proper.

[12] Jones asserts no other basis for her retaliation claim other than the alleged incident with Persell.

employment action," the court found no proximity in time to suggest a nexus between the events that would support the employee's retaliation claim. *Francom*, 98 Wn. App. at 862. Indeed, even a span of seven months between the alleged protected activity and the adverse employment action was held to be too long of a time to show a causal connection. *Hedenburg v. Aramark Am. Food Servcs., Inc.*, 476 F. Supp. 1199, 1209 (W.D. Wash. 2007) (applying the WLAD and federal law). Here too, the absence of a temporal proximity between the incident with Persell and Jones's discharge belies Jones's argument that a causal connection exists between the two events.[13] No such causal connection exists and, for this reason also, summary judgment dismissal of her retaliation claim was proper.

Moreover, the evidence unequivocally shows that the Commissioners' decision to terminate Jones was expressly based on Jones's poor performance as Assistant Director and as Interim Director. Commissioner Carter testified that, as Chair of the Commissioners, he talked to numerous employees of the fairgrounds, and the general consensus among the employees, including Adolphsen, was that Jones had difficulty making management decisions, had problems communicating

[13] Jones fails to address the requirement of a causal link. Indeed, notably absent from her argument on appeal is an identification of the date of the Persell incident or an acknowledgement of the passage of 15 months between that incident and her termination.

with others, and easily became threatened and emotional. CP 227-28 (". . . any time there was an issue that she didn't agree with or she didn't like, she became threatened by whoever she was talking to. And it became an issue where she would break down and literally start crying."). Although Carter could not identify by name the staff members from whom he heard the comments about Jones's inability to effectively perform her job, he specifically stated that the consensus among the staff was that Jones had the aforementioned deficiencies. These were the precise issues the Commissioners outlined to Jones in the pre-termination notice. Further, the reasonable inference to be drawn from Carter's testimony about the incident with Persell is that Carter's concern with Jones's handling of the incident with Persell was not because Jones reported the incident, but rather was because of the unprofessional way she handled the exchange between her and Persell.

Jones gravely mischaracterizes Carter's testimony by claiming that the only reason for Jones's termination was reporting Persell's actions and demanding his resignation. On the contrary, as a fair reading of Carter's testimony makes clear, the consensus among employees of the fairground—and Jones's superior, Adolphsen, as well—was that Jones's performance as Interim Director was substandard and that she was not qualified to perform that job. It was this reason, along with budgetary

concerns (Jones does not dispute the existence of budgetary concerns; in fact, she entirely fails to address this reason in her argument), that led to the Commissioners' decision to eliminate the position of Assistant Director and to terminate Jones's employment. The trial court properly dismissed Jones's retaliation claim on Respondents' motion for summary judgment.

3. Wrongful Discharge in Violation of Public Policy

Even though Jones states in her notice of appeal that she seeks review only of the dismissal of her retaliation claim, she includes in her brief an argument regarding her claim for wrongful discharge in violation of public policy, which the trial court also properly dismissed on summary judgment. Because Jones conflates the elements of the two causes of action in her argument, Grays Harbor will address Jones's wrongful discharge claim and the appropriateness of the summary judgment dismissal of that claim.

The tort of wrongful discharge in violation of public policy is a narrow exception to the employment at-will doctrine and, as such, should be applied cautiously so as to not swallow the at-will rule. *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). To prevail on a wrongful discharge claim, a plaintiff must show:

> (1) Washington has a clear public policy (the *clarity* element), (2) discouraging the conduct would jeopardize the public policy (the *jeopardy* element), and (3) that policy-protected conduct caused the dismissal (the *causation* element). If these three elements are met, an employer will still prevail if it is able to offer an overriding justification for the termination decision (the *absence of justification* element).

*Briggs v. Nova Servcs.*, 166 Wn.2d 794, 802, 213 P.3d 910 (2009) (emphasis in original; internal citations omitted). Jones has failed to demonstrate the existence of any of the elements of a wrongful discharge claim. Further, as demonstrated above, Jones's poor performance of her duties as Interim Fair Director, along with the County's budgetary concerns, are overriding justifications for Grays Harbor's decision to terminate Jones.

As to the first element, the existence of a clear mandate of public policy is a question of law for the court to decide. *Roe v. Teletech Customer Care Mgmt. LLC*, 171 Wn.2d 736, 757, 257 P.3d 586 (2011). To determine whether a clear mandate of public policy is violated, the court looks to whether the employer's conduct contravenes "the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). The court also examines prior judicial decisions that may establish a relevant public policy. *Farnam v. CRISTA Ministries*, 116

Wn.2d 659, 668, 807 P.2d 830 (1991). Generally, courts find a wrongful discharge in violation of public policy where an employee is terminated because he or she (1) refused to commit an illegal act, (2) performs a public duty or obligation, (3) exercises a legal right or privilege, or (4) reports employer misconduct and is terminated in retaliation for doing so. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996).

Jones claims that the clear mandate of public policy implicated here is the policy "'that women working for the County should feel safe and comfortable reporting assaults against women at the fairgrounds. Women should not fear retaliation from friends of an alleged assaulter for reporting an assault.'" Br. of Appellant at 9 (quoting Jones's response to Grays Harbor's motion for summary judgment, CP 647). Notably, Jones fails to cite any "constitutional, statutory, or regulatory provision or scheme" or judicial decision embodying the policy she claims exists. "*[C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.*" *Thompson*, 102 Wn.2d at 232 (emphasis in original). Further, as evident from Jones's own description of the incident with Persell, no "assault" occurred. Jones has not shown that the clarity element exists.

Even if, however, such a public policy exists, as Jones asserts, she nevertheless fails to demonstrate that her discharge jeopardized this policy. No cause of action for wrongful discharge exists unless such a cause of action is the "only available adequate means" to promote the alleged policy at issue. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 536, 259 P.3d 244 (2011). The burden of proving that the asserted cause of action is the only available means of promoting the public policy rests on the plaintiff. *Cudney*, 172 Wn.2d at 535. Here, Jones fails to recognize this burden that rests on her, let alone prove that her cause of action is the only available means of promoting her alleged public policy. Her brief contains nothing more than the self-serving and unsupported assertion that there is "no doubt" that discouraging women from reporting assaults "severely jeopardizes" this alleged "clear public policy." Br. of Appellant at 9. Jones has not shown that the jeopardy element exists.

Finally, even assuming that the clarity and jeopardy elements exist, Jones has failed to show that any policy-protected activities caused her termination. As demonstrated above with regard to Jones's retaliation claim, her termination was caused by her poor and unprofessional performance of her job duties and by budgetary concerns. In her appellate brief, Jones relies on her grossly distorted description of Commissioner Carter's testimony. As explained above, however, a fair reading of his

testimony belies Jones's assertion that he stated that Jones's reporting of the "assault" involving Persell was the reason she was terminated. Further, as also explained above, the passage of 15 months between the incident with Persell and Jones's termination precludes as a matter of law the assertion of the existence of any causal connection between the two events. Jones has not shown the existence of the causation element.

Thus, even assuming Jones's claim for wrongful discharge in violation of public policy is properly before this Court for review, despite her failure to identify the issue in her notice of appeal, this Court should conclude, as did the trial court, that Respondents are entitled to summary judgment dismissal of that claim, along with Jones's retaliation claim.

**B. Jones Is Not Entitled to a Reversal Based on Any Misapplication of LCR 7(b)(5)(E).**

Jones's procedural argument based on an alleged misapplication of Grays Harbor County Local Civil Rule 7(b)(5)(E) is meritless. "The application of a court rule is a question of law subject to de novo review." *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012). Here, after the trial court granted Respondents' motion for summary judgment in part, Jones's claim for disparate treatment discriminatory discharge remained. On August 24, 2012, Respondents filed a motion for reconsideration, asking the court to dismiss that claim as well. On September 6, 2012, the

trial court granted Respondents' motion for reconsideration and dismissed Jones's remaining claim. Immediately upon recognizing that LCR 7(b)(5)(E) directed the court, if not denying the motion for reconsideration, to request responding briefs and direct the movant to note the motion for hearing, the court requested a response from Jones and set a hearing. Because trial was scheduled to begin on September 11, 2012, the court requested Jones's response and set the hearing for first thing on September 10, 2012.[14]

Jones claims that she was prejudiced because she was not given adequate time to prepare a response to Respondents' motion for reconsideration. This, she claims, requires reversal of the order dismissing her claims on summary judgment. Her argument fails for several reasons.

First, Jones is not appealing the claim that was dismissed on Respondents' motion for reconsideration, namely, her claim for disparate treatment discriminatory discharge. Accordingly, even if a procedural

[14] This matter was filed and is venued in Grays Harbor County. Following the original scheduling of the special setting of the hearing on defendants' motion for summary judgment, defense counsel learned that all three of the judges of the Grays Harbor Superior Court were named plaintiffs in a lawsuit involving several of the named defendants in this case. Accordingly, while still venued in Grays Harbor County, this matter was transferred to be adjudicated by the Pacific County Superior Court. Unlike under Grays Harbor's rules, under Pacific County's local rules, a party is not required to wait until requested by the court to file a response to a motion for reconsideration, and there is no oral argument unless requested by the court. LCR 4(E).

error occurred with regard to the motion for reconsideration, it has no bearing on the issues on review in this appeal.

Second, in her response to Respondents' motion for reconsideration, Jones's entire argument is her allegation that the court should deny Respondents' motion because it contained the same arguments that are in Respondents' motion for summary judgment. Thus, according to Jones herself, there was nothing new in Respondents' motion for reconsideration for her to respond to. Indeed, her argument in her response consists solely of this "procedural" argument. According to Jones, then, advancing substantive arguments in response to Respondents' motion for reconsideration would have involved the simple task of cutting and pasting the arguments she made in response to Respondents' motion for summary judgment.

Finally, Jones's trial brief, which she claims she was preparing at the same time she was preparing her response to Respondents' motion for reconsideration, addresses only her claim for disparate treatment discriminatory discharge, which is also the only claim remaining for trial and therefore the only claim to be addressed in her response to Respondents' motion for reconsideration. Any misapplication by the trial court of a local rule does not mandate reversal of the summary judgment dismissal of Jones's claims.

## C. Jones Is Not Entitled to a Reversal Based on Any Misapplication of CR 56(c).

Jones's procedural argument based on an alleged misapplication of CR 56(c) is also meritless. *See Niccum*, 175 Wn.2d at 446 ("The application of a court rule is a question of law subject to de novo review.") As described above, Jones failed to timely file a response to Respondents' motion for summary judgment.[15] Rather than penalize Jones for her counsel's failure to meet the deadline by striking Jones's untimely response, the trial court instead allowed Jones's untimely response and imposed monetary sanctions. Respondents filed a reply to Jones's untimely response. Jones moved to strike the reply, arguing it was untimely.

Jones argues she was prejudiced and is thereby entitled to a reversal of the summary judgment order because Respondents' reply was filed less than five days before the hearing on the summary judgment motion. The clerk's minutes of the hearing on Respondents' motion for summary judgment show that the trial court was willing to give Jones's counsel additional time to prepare to address Respondents' reply and specifically asked counsel how much additional time would be needed. CP 575. Counsel responded that he would need three to four hours. CP

[15] CR 56(c) provides in part that the moving party "may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing."

575. Although this is not reflected in the minutes, Jones admits in her brief that the trial court offered to continue the hearing on the summary judgment motion for the requested three to four hours. Br. of Appellant at 14. Despite claiming the need for extra time and despite the court's offering to continue the hearing for the precise amount of time Jones's counsel claimed he would need, counsel abandoned his request for a continuance and asked that the hearing proceed. As stated in the minutes: "Plaintiff's counsel noted he preferred to move forward at this time." CP 575. Jones cannot now claim that she was prejudiced by not getting a continuance. Nor can she claim, as she does on appeal, that by asking for three to four hours to prepare, she really did not mean three to four hours if counsel would be working without his staff. That was an argument to present to the trial court. There is nothing in the record to suggest that she did so. Jones's argument that she is entitled to the reversal of the order dismissing her claims on summary judgment because of any misapplication of CR 56(c) is without merit.

**D. <u>This Court Should Not Address Arguments Raised for the First Time in the Conclusion Section of Jones's Brief</u>.**

In the conclusion section of her brief, in addition to asking for the reversal of the order granting Respondents' motion for summary

judgment, Jones makes, for the first time, several other "arguments." Specifically, Jones claims she is entitled to:

- The removal of Judge Sullivan from the case on remand;
- The remand of the case to Thurston County Superior Court;
- Reversal of the trial court's order granting Respondents' motion for reconsideration, dated September 10, 2012;
- The addition of certain documents to the docket;
- The vacation of the order awarding Respondents sanctions;
- An award of attorney fees and costs.

This Court need not and should not address any of these requests for relief for several reasons. First, Jones presents no legal authority in support of these arguments. RAP 10.3(a)(6) requires that arguments be supported by legal authority and references to relevant parts of the record and that arguments be presented in the argument section of a party's brief, not in the conclusion. Second, Jones does not assign error to the September 10, 2012 order or the order awarding Respondents' sanctions. When an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(4) and additionally fails to present any argument on the issue or provide any supporting legal authority, the appellate court

will not consider the merits of that issue. *Ang v. Martin*, 154 Wn.2d 477, 487, 114 P.3d 477 (2005). Third, a request for fees and expenses must be set forth in a separate section of the requesting party's brief. RAP 18.1(b). This requirement is mandatory; argument and citation to authority are required so as to advise the appellate court of the appropriate ground for an award of fees and expenses. *In re Marriage of Coy*, 160 Wn. App. 797, 808, 248 P.3d 1101 (2011).

## IV. CONCLUSION

For the foregoing reasons, Respondents request that this Court affirm the order granting their motion for summary judgment dismissing Jones's claims and deny Jones's requests for relief set forth in the conclusion section of her brief, including her request for a reversal of the order granting Respondents' motion for reconsideration and her request for an award of attorney fees and costs.

DATED: January 29, 2013.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Respondents on:

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by the following indicated method or methods:

☒ by **mailing** full, true, and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.

☒ by sending full, true and correct copies thereof via **e-mail** addressed to the e-mail address shown above for the attorney for appellants, on the date set forth below.

☒ by causing full, true and correct copies thereof to be **hand-delivered** to the attorney at his last-known office address listed above on the date set forth below.

DATED this 29 day of January, 2013.

Duffy Romnoy